No. 84-1841

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IN THE

Supreme Court of the United States

October Term, 1984

METHODIST HOSPITAL OF BROOKLYN, ACCIDENT PREVENTION & SAFETY LEAGUE, INC., and NAGEL, INC.,

Appellants,

against

THE STATE INSURANCE FUND, MARTIN A FISCHER, EASTMAN BIRKETT, LOUISE COSTE, CHARLES G. MOERDLER, ALBERT C. TODARO, RIVKA CHATMAN, BART DI MATTINA, JAMES H. SCHOLTZ, and LILLIAN ROBERTS, as Commissioners of the State Insurance Fund; JUSTIN SCHULMAN, as Supervising Actuary of the State Insurance Fund; EDWARD V. REGAN, as Comptroller of the State of New York; RODERICK CHU, as Commissioner of Taxation and Finance of the State of New York; and the STATE OF NEW YORK,

Appellees.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS OR AFFIRM

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Questions Presented

1. Does the transfer of surplus monies from one New York State fund operating a workers' compensation program to another State fund impair a contractual obligation or deny due process of law where (1) the governing statute for the program contains no contractual term precluding such transfer, (2) the transfer has no effect on the scope, amount, or conditions of coverage provided to participating employers, and (3) the State remains fully liable for all valid claims submitted by such employers, even if these exceed the amount in the transferor fund?

2. Was there fair or substantial support for the decision of the court below in ruling that under State law appellants possess no property interest in the surplus transferred?

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MOTION TO DISMISS OR AFFIRM

Appellees, Edward V. Regan, as Comptroller of the State of New York, and Roderick Chu as Commissioner of Taxation and Finance of the State of New York, and the State of New York, in the above entitled cause, move to dismiss and/or affirm on the ground that it is manifest that the questions on which the decision of the cause depend are so insubstantial as to need no further review by this Court.

Counter-Statement of the Case

Appellants have noticed this appeal from a unanimous decision of the New York Court of Appeals, 64 N.Y.2d 365 (1985), sustaining the constitutionality of certain provisions of Chapter 55 of the Law of 1982. Those provisions authorize and direct the transfer of surplus from the State Insurance Fund ("the SIF") to the State's General Fund. Other provisions of Chapter 55 require that yearly appropriations be set aside, in an amount equal to the surplus transferred, for the purpose of maintaining the solvency of the SIF. These sums would be re-transferred from the General Fund to the SIF were such re-transfer necessary to pay valid claims against the SIF. *See* N.Y. Workers' Compenstaion Law ("WCL") § 87-f, set out at J.S. App. A-46-47. Each year since 1982 those yearly appropriations have been made. *See* L. 1982, ch. 404, L. 1983, ch. 50; L. 1984, ch. 50; L. 1985, ch. 50.

Appellants' arguments under both the United States and State Constitution were fully assessed and rejected by the trial court, four of five judges of the intermediate appellate court, as well as the Court of Appeals. (J.S. App. A-1—A-45). In this Court, appellants have tried to recast their Contract Clause and Due Process Clause arguments. Nevertheless, the undisputed facts, the plain meaning of Chapter 55, and the weight of this Court's decisions combine to render these contentions insubstantial.

Statement of Facts

Appellees adopt and rely on the facts set forth in the appellate opinions below. J.S. App. A-17 to A-19, and A-37 to A-40 as to the enactment of Chapter 55 and the procedural history of the case. Appellees also note that since 1913 the SIF has been an integral component of State government as part of the Department of Labor. It insures employers against liability for personal injuries or death sustained by their employees, WCL § 76. SIF is managed by eight Commissioners, all of whom are appointed by the Governor with the advice and consent of the State Senate, including *ex officio* the State Commissioner of Labor and the State Commissioner of Health, WCL § 77. All of the rules and regulations of the State Insurance Fund are subject to approval by the Commissioner of Labor, WCL § 83.

Reflecting the State's intensive regulation of the SIF, appellants' written policies with the SIF also contain the following significant limitation in Article 12:

> "12. Application of Policy. THIS POLICY is to be construed by reference to the [Workers'] Compensation Law as re-enacted and *as heretofore or hereafter amended, which shall in all cases govern as to its contents and meaning.*" (Initial emphasis in original, other emphasis added; reprinted at J.S. App. A-63).

In 1922, the Legislature amended the WCL to delete language that had limited the State's liability for claims against the SIF to the amount in the SIF itself. L. 1922, ch. 615. The State's assumption of liabilty for SIF's un-

paid claims is unmistakable evidence the SIF is performing a governmental function, and the SIF itself acknowledged this governmental status in its answer to the complaint.

ARGUMENT

POINT I

Appellants Have No Contract Rights That Have Been Unconstitutionally Impaired.

All the parties agree that appellants' written policies with the SIF afford them certain contract rights, that a statute may also provide contract rights depending on its terms, and that contract rights can inhere in case law interpreting and enforcing the contract. Appellants, however, were unable to persuade the courts below that their written contracts or the WCL preclude the challenged provisions of Chapter 55, or that any prior opinions construed those contracts as prohibiting the enactment of those provisions.

Appellants simply do not enjoy contractual rights as to the level of premiums, dividends, reserves or the use of the SIF surplus. Moreover, as to those contractual rights that appellants do possess, i.e. coverage of specified risks, they have not shown any impairment. Without a showing of a severe impairment to a specific contractual right, a claim based on Article I, § 10 is legally insufficient. *Allied Structural Steel Co.* v. *Spannaus,* 438 U.S. 234, 244-245 (1978); *see also, Energy Reserves Group, Inc.* v. *Kansas Power & Light Co.,* 459 U.S. 400, 411 (1983).

A. The Workers' Compensation Law Provisions Cited By Appellants Set Forth General State Policy. They Do Not Afford Specific Contract Rights.

Appellants' signed contracts with the SIF do not assure any particular levels of premiums, dividends, reserves or surplus. Their policies explicitly provide, in fact, that their terms shall be governed by the WCL, *including amendments.* (Sample Policy, ¶ 12; J.S. App. at A-63) Nonetheless, appellants argue that the WCL contains covenants precluding any rise in premiums or decrease in dividends that might occur because of Chapter 55 and covenants precluding the transfer of monies from the SIF to the State's General Fund. Appellants mistake declarations of legislative policy found in the WCL for actual contractual commitments that have been specifically legislated.

This Court has repeatedly drawn a salient distinction between policy and promises in refusing to hold that certain statutes created contractual rights. *National Railroad Passenger Corp.* v. *Atchison, Topeka & Sante Fe Ry. Co.*, —— U.S. ——, 84 L. Ed. 2d 432, 446 (1985); *Dodge* v. *Board of Education*, 302 U.S. 74, 79 (1937); *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U.S. 379, 385 (1903). A reading of the WCL sections on which appellants rely, set out at U.S. App. A-47—A-55, readily reveals that these promulgate a mutable regulatory policy, rather than binding covenants. Appellants cannot point to any contractual language in the WCL that would "overcome this well-founded presumption", and the Court should have no difficulty in viewing the WCL as a "scheme of public regula-

tion", rather than a contract with identified promisees. *National Railroad Passenger Corp.*, 84 L. Ed. 2d at 446.

As the Court of Appeals correctly found, neither WCL §§ 76 nor 86 contains any contractual promise to preserve a specific amount of surplus or reserves or to bar use of any SIF monies for any other State purpose. (J.S. App. at A-42—A-43). Unlike the general language in § 76, the terms of the statute construed in *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 9-10 (1977), was an explicit statutory covenant to specified promisees that certain monies would be devoted exclusively to carefully enumerated ends.

The WCL does not contain the words, "the State covenants," or that the SIF monies "shall be used only" for defined objectives, or that the State will not apply the SIF monies for any purposes "other than permitted purposes hereinafter set forth".* The sections do not say that the State "will not limit or alter" the SIF's rights to utilize excess monies, and at no point does the WCL pledge that the State "will not in any way impair the rights and remedies" of policyholders. Those phrases would be indicia of a legislative intent to enter into a contract and bestow specific contract rights—but none of them are present in the WCL provisions on which appellants rely. *Compare*

* It is noteworthy that WCL § 15 creates a "special disability fund" and, as to this fund, its use is limited explicitly to a particular purpose, in contrast to WCL § 76 where no such language appears. *See also*, e.g. State Finance Law §§ 77(3); 88(3); 88-a (3); 92-k(3). Clearly, had the Legislature intended to insert the restriction which appellants claim, it surely would have known how to do so. *National Labor Relations Board* v. *Bildisco & Bildisco*, —— U.S. ——, 79 L. Ed. 2d 482, 493 (1984). The lack of explicit restrictions on the SIF monies, found elsewhere in the WCL as to other compensation funds, further undercuts appellants' construction of the WCL.

1962 N.J. Laws, ch. 8, § 6 construed in *U.S. Trust Co., supra,* 431 U.S. at 11.

WCL § 89, dealing with premiums, is by no means a commitment that premiums can never be raised except in certain specified contingencies. Rather, the statute sets the parameters of policy and affords the SIF Commissioners considerable discretion to achieve specified goals. Section 89 speaks of premiums to be charged at "the lowest *possible* rates" and adds a crucial proviso—"consistent with reasonable reserves and surplus" (emphasis added). In view of the use of such comparatively inexact terms as "possible" and "reasonable"—terms susceptible to varying interpretations—§ 89 cannot fairly be deemed a contract. Section 90, dealing with dividends, provides only that dividends "*may* be credited or paid" (emphasis added)—not that dividends shall be paid in any particular amount. To construe this permissive language as bestowing enforceable contract rights if premium and dividend levels change is a distortion of the explicit language and intent of the WCL.

Not only does the text of the WCL belie appellants' inference of some legislative "contract", but the context in which the SIF was created when the WCL was enacted similarly was non-contractual. The SIF was formed in aid of the State's broad police powers to regulate social welfare, not to attract policyholders' investments. *State Insurance Fund* v. *Boyland,* 282 A.D. 516, 523 (1st Dept., 1953) *affd. without opinion* 309 N.Y. 1009 (1956); *Jensen* v. *Southern Pacific Co.,* 215 N.Y. 514, 526-28 (1915), *revd o.g.* 244 U.S. 205 (1916). Having mandated compensation coverage for specified employers upon pain of criminal

and administrative sanctions (WCL §§ 50, 52, 26-a), the Legislature had no need to "induce" appellants to purchase from the SIF.* The Legislature created the SIF to facilitate employers' compliance with their legal obligation; but so long as employers were covered—whether by private carriers, self-insurance or the SIF—its predominant concern with protecting employees would be satisfied. Thus, appellants are wrong when they treat the mandatory purchase of workers' compensation coverage as the equivalent of a voluntary investment in publicly issued bonds for purposes of Art. I, § 10. As the Legislature had no need or aim to attract purchasers to the SIF (in sharp contrast to its need to attract prospective bond buyers), it is not surprising that the regulatory language of the WCL is very different from the contractual language in *United States Trust Co.*

Unable to find support in their policies or the WCL, the appellants next argue that the SIF is bound by an "implied covenant" not to part with any of its reserves without the consent of its policyholders—as the Court of Appeals held in *Mason* v. *Cronk,* 125 N.Y. 496 (1891) with respect to a *private* insurer. (J.S. at 15). It should suffice to note that an uncontradicted affidavit by the Superintendent of Insurance revealed that only surplus, and not one penny of reserves is being transferred. Appellants' own broker confirmed in a letter to policyholders after Chapter 55's enactment that surplus was transferred, not

* The closest instance of an "inducement" is the provision in WCL § 53 immunizing SIF policyholders from liability to employees for injury or death. Appellants have never claimed that Chapter 55 diminishes this benefit in the slightest.

reserves; and, appellants own actuarial calculations on the impact of the transfer assumed no diminution in reserves.*

Besides ignoring the facts, appellants misconceive the applicable law. The Court of Appeals thoroughly analyzed the WCL and concluded that the SIF is simply not a private mutual insurance company, but a part of New York State Government. (J.S. App. A-40—A-42; *see also,* decision of the Appellate Division at J.S. App. A-20—A-23, cited with approval by the Court of Appeals.) The SIF's assets are State assets, its liabilities are State liabilities; its directors, officers, employees are State officers and employees. Its funds are held by the State Commissioner of Taxation and invested and deposited just like other State monies; and its budget is approved and audited by the Legislature and State Comptroller respectively. WCL §§ 76-88 (J.S. App. at A-47—A-55).

Far from holding that the SIF is a private mutual insurer, the pre-existing case law undermines this aspect of appellants' claim. In 1935 the Court of Appeals unanimously held that the SIF was comprised of State money *Cahill* v. *Tremaine,* 269 N.Y. 573 (1935) *aff'g without opinion* 245 App. Div. 773 (3rd Dept., 1933). In 1950 and 1953 the Court of Appeals held that SIF liabilities were enforceable against the State in the State Court of Claims. *Skakandy* v. *State,* 298 N.Y. 886 (1950), *aff'g* 274 App. Div. 153 (3d Dept., 1949); *Cardinal* v. *State,* 304 N.Y. 400

* Contrary to appellants' glaring misreading of the financial statements in SIF Annual Reports, a copy of which will be supplied at the Court's request, the total loss reserves *increased* to over 1.5 billion dollars in 1983 from 1.1 billion in 1981, even after the transfer. The only decrease was in "unassigned working capital", i.e. surplus, *not* in reserves.

(1953). In 1956 the Court of Appeals unanimously affirmed a decision that the SIF as a State agency was exempt from local real property taxation on its office property. *State Insurance Fund* v. *Boyland,* 282 App. Div. 516, 523 (1st Dept. 1953), *affd. no opinion,* 390 N.Y. 1009 (1956).

Based on these precedents, the courts below were fully justified in rejecting appellants' argument that the rule applicable to a private insurer in *Mason* v. *Cronk, supra,* was applicable to the SIF. The Court of Appeals' construction of New York Law in this regard is entitled to the customary deference. *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 111-112 (1980); *Demorest* v. *City Bank Farmers Trust Co.,* 321 U.S. 36, 42 (1944) citing *Broad River Power Co.* v. *South Carolina,* 281 U.S. 537 (1930).

B. Because The Transfer Of Surplus Has No Retroactive Adverse Effect On Appellants' Existing Policies, The Contract Clause Is Inapplicable.

Equally fatal to plaintiffs' Contract Clause claim is the evidence elicited via discovery of appellants and their compensation insurance broker. No evidence was offered to indicate that Chapter 55 would have any retroactive effect upon premium or dividend levels on policies in force when the legislation was enacted in April, 1982. Indeed, appellants' broker testified that any rise in premiums due to enactment of Chapter 55 would not occur until 1984 at the earliest—long after these appellants could voluntarily decide not to renew their SIF policies which were in effect at the time of enactment (Policy ¶ 4, J.S. App. at A-61,

WCL § 94). Moreover, even after Chapter 55 had been enacted, appellants' broker wrote to Methodist Hospital that he anticipated a bright future for insureds such as the Hospital in terms of keeping down the cost of SIF coverage and maintaining "a consistently high level of Dividend in the year ahead."

Notwithstanding their hyperbolic speculation about a future State bankruptcy (J.S. at 17), upon which appellants rely to buttress their arguments, three basic and irrefutable points emerge clearly: (1) appellants have not suffered any *retroactive* increase in premiums or lowering of dividends because of Chapter 55 under their then existing 1982-83 policies; (2) there is absolutely no evidence that SIF would not defend or pay any compensation claim against which appellants had insured in conformity with their policies; and (3) there is no proof that Chapter 55 has diminished by one iota the absolute immunity from direct claims which appellants enjoy under WCL § 53 as SIF insureds, *even if* a claim were not paid. Chapter 55 makes no change at all in the amount or scope of coverage.* It does not impose new burdens on appellants, such as having to defend or pay on a previously covered risk, or change the procedures by which the SIF defends or pays.

Appellants also err in placing heavy reliance on decisions from other states—based on dissimilar statutes and case law—to reinforce their arguments about impairment of contracts and deprivation of due process. Indeed, none of appellants' authorities from other states came against a background of decisions holding claims against the SIF

* Inexplicably, appellants disregard the Court of Appeals' unmistakable holding in this regard. *Cf.* J.S. at 11-12 with J.S. App. at A-41—A-42.

to be enforceable against the State itself. *Cardinal* v. *State, supra.* The State's obligation to cover the SIF's unpaid liabilities is of critical significance, as the Court of Appeals found. (J.S. App. at A-41—A-43) It is this commitment that indicates that the SIF is carrying out a sovereign governmental function, as part of the State's sovereign role in mandating compliance with regulatory, social welfare legislation. *Jensen* v. *Southern Pacific Ry. Co., supra.**

All this stands in sharp contrast to the kind of wholesale sudden abrogation of insurance coverage that occurred

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* The court in *Moran* v. *State,* 534 P.2d 1282 (Okla., 1975) made much of Oklahoma's state refusal to have anything to do with liabilities of the Oklahoma fund beyond the amount of that fund. First, that Court italicized the Oklahoma statutory provision disclaiming liability on the part of Oklahoma (534 P.2d at 1284-86), and then it repeated this same point in emphasizing that employers were (unlike employers in New York) liable for unpaid claims, and that the State of Oklahoma would not cover such unpaid claims (534 P.2d at 285-86). That consideration was certainly pertinent to the Oklahoma decision, and the fact that New York takes precisely the opposite view properly was of equal relevance to the courts below. Similarly, in *Gronning* v. *Smart,* 561 P.2d 690 (Utah 1977), the Utah Court simply relied on a prior decision, *Chez* v. *Industrial Comm.,* 90 Utah 447, 62 P.2d 549 (Utah, 1936), in holding that under Utah law employers have a property interest in that State's fund. Like *Moran,* the *Chez* opinion emphasized that the State of Utah had no liability for that State's fund beyond the amount of the fund. The same type of statutory disclaimer was construed in *State ex rel. Williams* v. *Musgrave,* 84 Idaho 77, 370 P.2d 778, 784 (1962); *Industrial Comm.* v. *School Dist. No. 48,* 56 Ariz. 476, 108 P.2d 1004 (1941); *Senske* v. *Fairmont & Waseca,* 45 N.W.2d 640 (Minn. 1951) cited by appellants. In *Bennett* v. *State Indus. Acc. Comm.,* 203 Ore. 275, 279 P.2d 655 (1955) and *State* v. *Florida State Improvement Comm.,* 158 Fla. 743, 30 So.2d 97 (1947), the respective statutes of Oregon and Florida explicitly declared that the funds in those states would *not* be State funds; the WCL has no comparable provision. In *Sims* v. *Mouer,* 41 Ariz. 486, 19 P.2d 679 (1933), the Arizona court expressly ruled the money in that State's Fund was public money, the policyholders had no ownership interest in it, and that Fund expenditures were not subject to their control. (19 P.2d at 685). Other than *Moran* v. *State* and *Gronning* v. *Smart,* none of appellants' authorities concerning compensation funds in other states implicated the Contract Clause or Due Process Clause.

in *Lynch* v. *United States,* 292 U.S. 571 (1934), or the retroactive imposition of onerous regulatory burdens that were involved in *Allied Structural Steel* v. *Spannaus, supra,* or the retroactive contravention of a specific contractual term as in *United States Trust Co.* v. *New Jersey, supra.* Whatever may occur in the future to make SIF policies less attractive so that would-be purchasers, such as appellants, elect to purchase coverage elsewhere is quite simply speculative and not cognizable injury, or at least is not the kind of injury which comes within the terms of the Contract Clause. *United States Trust Co.* v. *New Jersey, supra,* 431 U.S. at 18, n. 15 citing *Ogden* v. *Saunders,* 12 Wheat 213 (1827); *Munday* v. *Wisconsin Trust Co.,* 252 U.S. 499, 503 (1920). Appellants had from April 12, 1982 (when Chapter 55 was approved) to March 1, 1983 (when the transfer occurred) to obtain alternative coverage before the SIF transferred any monies to the General Fund. The lengthy period of time between enactment of the challenged legislation and its effect upon appellants sharply distinguishes this case from the instantaneous and severe retroactive effect of the laws struck down in *U.S. Trust Co.* and *Allied Structural Steel.* It renders their Contract Clause arguments insufficient, even assuming *arguendo* they had established a contractual impairment in the first place.

C. The Enactment Of Earlier Legislation Regulating SIF Monies Further Negates Appellants' Contract Clause Claim.

In deciding cases brought under the Contract Clause, this Court has often considered the extent of prior legislation regulating the particular field in which the asserted contract arises. The Court has recently reiterated that

"In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past." *Energy Reserves, supra,* 459 U.S. at 411; *see also, National Railroad Passenger Corp.,* 84 L. Ed.2d at 448. It is significant, first, that the "parties are operating in a heavily regulated industry" with "extensive and intrusive" state regulation, *Energy Reserves,* at 413-14, and second, that "the contracts [at issue] expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law", *id.* at 416-17. *See also, Veix* v. *Sixth Ward Assn.,* 310 U.S. 32, 38 (1940); *compare Allied Structural Steel* v. *Spannaus,* 238 U.S. at 250.

Here, not only had the Legislature exercised detailed oversight of the SIF since enactment of the Workmens' (now Workers') Compensation Law in 1914, but it had twice within the last decade enacted laws directly providing for disposition of SIF assets. WCL §§ 87-a—87-d. Thus, appellants were unquestionably aware when they renewed their policies, first, that the Legislature had previously directed the use of SIF monies and, second, that policies they might obtain in the future remained subject to future WCL amendments such as Chapter 55. It strains credulity that appellants harbored any firm expectations that the Legislature would never again amend the WCL on this subject, particularly because their SIF policies explicitly provide that any such amendment shall govern the "contents and meaning" of their contracts with the SIF. (Sample Policy, ¶ 12, J.S. App. at A-63)*

* This clause of appellants' policies would also override any "implied covenant" of the type enforced against private carriers in *Mason* v. *Cronk, supra,* even if reserves had actually been transferred and the SIF were deemed a private insurer.

Appellants' citation to *Lynch* and *U.S. Trust, supra* (J.S. at 18), is unavailing because the contract language on which the respective defendants there relied regarding future statutory changes could not override direct violations of specific contractual commitments in each case. By contrast, the text of Article 12 of appellants' policies plainly allows for the kind of amendment to the WCL having at most an incidental effect on those policies, e.g., possibly increasing premiums. Chapter 55 in no way contravenes, however, any term of the written contract granting appellants the insurance coverage for which they had contracted; nor does it conflict with either a pre-existing statute or with decisional law construing SIF contracts.

POINT II

Because Appellants Do Not Have a Property Interest In the SIF Surplus, Chapter 55 Does Not Contravene the Fifth and Fourteenth Amendments.

Appellants' claim under the Due Process Clause is in part essentially a repetition of their contentions that Chapter 55 impairs contractual obligations. The asserted property rights do not, in fact, exist for the reasons stated above. Appellants nowhere point to "state law rules or understandings" as to the SIF's operation that would ground the property interests which they claim. *Roth* v. *Board of Regents,* 408 U.S. 564, 577 (1972), *see also, Bishop* v. *Wood,* 426 U.S. 341, 344 (1976).

Appellants apparently also insist that since they paid premiums to SIF and SIF receives no tax revenue, all SIF monies—including the surplus transferred—is their money over which the State has no control. Appellants' novel theory under the Due Process Clause that the $190 million

in the Fund belongs to them, either legally or beneficially, has never been judicially adopted in New York. Appellants ignore the many differences between the SIF and private carriers—differences that the Court of Appeals and other New York courts have repeatedly emphasized in a variety of contexts, and which are evident from even a cursory reading of the WCL.

No private insurer has its directors selected by the Governor with the advice and consent of the State Senate, WCL § 77, not by its stockholders or policyholders. No private insurer has its treasurer and investment adviser selected not by its directors but by the Legislature as the Commissioner of Taxation and Superintendent of Insurance respectively, WCL §§ 85, 87. No private insurer has its employees selected under State Civil Service rules, WCL § 87. No private insurer has its excess monies deposited in the same manner as State funds, WCL § 85. No private insurer has its budget legislatively approved, or its expendtiures pre-audited by the State Comptroller, WCL § 88; L. 1981, Ch. 1056. No private insurer has its investments mandated by the Legislature, WCL §§ 87-a, 87-b and 87-c. No private insurer enjoys the type of exemptions from State and local taxes that SIF enjoys, Tax Law, § 1500(a), 1951 Opinion Attorney General 211.

This is the third time since 1933 that New York appellate courts have held that the SIF is a State agency which is included in the legislative appropriations process and whose monies are State monies. *State Ins. Fund* v. *Boyland, supra* (real property of SIF held exempt from city taxes as property of the State); *Cahill* v. *Tremaine, supra* (compensation of SIF employees held to be from State monies so as to be subject to legislative reduction). In

these decisions, the issue that was squarely presented was whether SIF monies were separate from or an integral part of State monies. Arguments virtually identical to those made now were made there.

Having reaped the benefits of the State's non-profit management of the SIF and SIF's exemption as a State agency from almost all taxation, and having allowed the State to be the financial guarantor of SIF liabilities, appellants have neither logic nor law on their side in asserting private property interests in the SIF. The text of the WCL, the circumstances surrounding its enactment, and the decisions of the Court of Appeals construing it, refute their claim.

This is not a case in which New York has ever conceded the SIF surplus to be owned by policyholders, apart from the specific dividend payments that are paid in the SIF's sole discretion.* No New York statute, regulation or judicial opinion has ever stated that the SIF surplus is held for appellants' benefit such that Chapter 55 amounts to an invasion or taking of their property. *Compare Webb's Fabulous Pharmacies, Inc.* v. *Beckwith,* 449 U.S. 155 (1980), *Loretto* v. *Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982) cited by appellants. (J.S. at 24).

While appellants may have harbored a "unilateral expectation" that all SIF surplus would always remain in the SIF account, *Roth* v. *Board of Regents,* 408 U.S. at

* No claim is made that Chapter 55 diverted any dividend payments that had already been earmarked for policyholders. Indeed, appellants' own evidence below showed that the transferred surplus did not come from the SIF's contingent balances from which the SIF pays dividends under § 90. Moreover, projection from an actuary whose views appellants adopted assumed no diminution in dividends even after the transfer.

577, appellants' written contract contains no recital granting them a property interest in the surplus, and the courts below had a fair basis for concluding that the WCL provides no such support. In fact, prior cases had uniformly rejected any such notion.* Appellants' Due Process Clause claim, like their Contract Clause claim, proceeds from a misconception of New York law and was correctly rejected below.

Conclusion

As appellants have failed to raise a substantial constitutional issue, the instant appeal should be dismissed or affirmed.

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Respectfully submitted,

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* Appellants also attempt to circumvent the dispositive holdings of prior New York cases by listing decisions from other states which have found compensation insurance funds in those states to be actually or beneficially owned by insureds. If the nature of the SIF monies had never before been adjudicated in New York, perhaps those citations might be of value. But, in light of dispositive decisions of the Court of Appeals in *Cahill*, *Boyland* and *Cardinal*, holding SIF assets to be State assets and SIF liabilities to be State liabilities, it is not surprising that these cases—involving insurance funds in other states, organized and operating under different statutes, and adjudged under different case law precedents—were not at all persuasive to the courts below. *See ante* at 12n.